08-CV-017

UNITED STATES DISTRICT COURT

District of Alaska
222 West Seventh Avenue, Unit 32
Anchorage, AK 99513-7591

John W. Sedwick
Chief Judge

907.677.6251

October 15, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Fed. R. Civ. P. 56

Dear Mr. McCabe:

This letter is submitted for the Committee's consideration as it evaluates the proposed amendments to Federal Rule of Civil Procedure 56. Proposed Rule 56(c) is my focus.

Proposed Rule 56 (c) should not be adopted. Perhaps alluring in concept, it would be inimical to the interests of justice in practice. I know this, because for ten of my sixteen years as a federal trial judge, I have routinely handled civil cases in a sister district which has a local rule that is functionally identical to Proposed Rule 56(c) while my own district has no such rule. My experience indicates that the requirement to submit lengthy enumerated statements of fact supported by citations to the record wastes the time of counsel and the court without providing any perceptible benefit.

In 1992, I was appointed to the District Court for the District of Alaska. In November 1998, I begin taking civil cases in the District of Arizona, which was then overwhelmed with work. Since then, I have been assigned more than 1,200 Arizona civil cases running the gamut from *pro se* prisoner litigation to patent cases. In many of these cases, summary judgment or partial summary judgment motions were filed in conformity with an Arizona local rule which is in substance identical to Proposed Rule 56(c). It is currently codified as Arizona Local Civil Rule 56.1. Of course, many summary judgment motions have also been filed in my Alaska cases where no comparable requirement appertains.

Summary judgment papers in Arizona are usually much longer than summary judgment papers in Alaska because of the need to file a separate statement of facts

with supporting papers. Each list of facts is typically supported by citations to attached deposition transcripts, affidavits, business records, e-mails, and so forth. In a few cases, a separate motion practice arises in which one party moves to "strike" all or a portion of another's statement of facts or supporting materials. Summary judgment papers in Arizona can be truly gargantuan. A summary judgment motion filed recently in one of my cases was supported by a statement listing 322 facts to which was appended 524 pages of exhibits. (Case No. 2:06-cv-01412) In another case, the summary judgment papers included more than 1,000 pages of exhibits between the two parties. (Case No. 2:06-cv-00121) A list of 20 to 30 statements of fact with 75 to 100 pages of exhibits is probably typical.

My law clerks and I spend up to twice as much time on summary judgment motions brought under the Arizona Rule as we spend on comparable summary judgment motions in Alaska. This represents a substantial increase in the expenditure of judicial resources. Similarly, given the amount of paper that must typically be reviewed and assembled, the Arizona rule surely makes for a significant increase in the time counsel must devote to summary judgment motions. Based on my experience, It is reasonable to expect Proposed Rule 56(c) to significantly increase both the expenditure of judicial resources and the cost to litigants of summary judgment motion practice.

Despite increased costs to the litigants and the consumption of additional judicial resources, no perceptible benefit flows from the Arizona rule. Summary judgment motions are brought about as frequently in Alaska as they are in Arizona and with about the same rate of success. One might speculate that the elaborate statements of fact required by the Arizona rule improve the quality of the court's decision. That has not been my observation. Even if that speculation were correct (which I doubt), the practical benefit would be small, for summary judgments are not often reversed due to a factual error by the trial court.

In busy courts, Proposed Rule 56(c) will likely shift more responsibility for civil litigation from the district judges to magistrate judges. There are districts where the felony workload is so high that district judges already are forced to cede much of the civil docket to magistrate judges. It would be irresponsible to adopt a rule which will increase the pressure on district judges to take an even less active role in civil cases.

Consider carefully the type of case in which a party may support his motion for summary judgment with a simple assertion that no material facts are in dispute under existing Rule 56. In such cases the non-moving party may concede that point and resist the motion only on the law. Sometimes the non-moving party may point to two or three issues of fact which he deems to be both material and in dispute. Rarely in a case with competent counsel on both sides does one see a non-moving party respond with a long list of allegedly material facts in dispute. Yet, under Proposed Rule 56(c) both parties in such cases would be forced to prepare a list of facts, and append

supporting documents. Because counsel for the moving party cannot know what facts the opposing party might contend are material, he or she is very likely to create a longer list than is actually necessary. The filing of a long list by the moving party will encourage the responding party to do likewise. Lawyers who have even a tiny doubt about whether a fact should be listed will usually resolve that doubt in favor of adding the fact to the list.

In my Arizona cases, I have observed that after I parse the parties' papers, the competing lists of facts may include many that turn out to be either immaterial or not disputed. Parsing the papers is more complicated than those who have not performed the task might think. When many facts listed by a moving party are not truly material (as happens), the responding party may conclude that his adversary really must establish those facts. This can generate a substantial effort to show that facts which actually do not make any difference are in dispute. The responding party may be inspired by inclusion of immaterial facts on movant's list to include additional immaterial facts in respondent's list which would then be attacked in the reply memo.

Here are some questions you should seriously contemplate before imposing Proposed Rule 56(c) on the district courts:

If Proposed Rule 56(c) were in effect–

(1) How much more money would it cost a client when his case involves summary judgment practice?

(2) How much more work would it be for a trial judge to evaluate a summary judgment motion?

(3) What benefit would flow from the extra investment of litigant and judicial resources?

(4) In busy courts where district judges already must rely on magistrate judges to handle civil work, how much more responsibility for the civil docket would be shifted to magistrate judges?

(5) Is it sensible to adopt a rule which will differentiate summary judgment practice in federal court from the practice in many state courts, especially when there is no significant benefit to doing so?

In closing, I urge you to reject addition of Proposed Rule 56(c) to the Federal Rules of Civil Procedure. If you do, you would also need to revise Proposed Rule 56(e), which includes a reference to Rule 56(c), and jettison Proposed Rule 56(g) in its entirety, for it would be inoperable without Rule 56(c).

Very truly yours,

John W. Sedwick, Chief Judge
United States District Court - Alaska

cc: Hon. James Teilborg